



TOWN OF WEARE
PLANNING BOARD
ZONING BOARD OF ADJUSTMENT
15 Flanders Memorial Road
P.O. Box 190
Weare, NH 03281
Phone: (603) 529-2250
Fax: (603) 529-7527

Charles F. Meany, III
Land Use Coordinator

Office Hours:
Monday
thru
Friday
8 AM – 4:30 PM

**PLANNING BOARD
MINUTES
JANUARY 14, 2010
(Approved as amended 2/25/10)**

PRESENT: Craig Francisco, Chairman; Frank Bolton, Vice Chairman; George Malette Secretary; Neal Kurk; Tom Clow, Exofficio; Dani-Jean Stuart, Alternate; Naomi L. Bolton, Town Administrator (recording secretary)

GUESTS: Nancy Fillmore; Bruce Fillmore; Chris Bolton; Katherine Cloud; Wendy Stevens; Jed Callen; John Nelson; Emerito Rolon; Stephen Fifield; Mitch Filson; Barry Arnold; Beth Salerno; Thelma Tracy; John Tracy; Ed Loppi; Corinne Hill; Jeannine Petriel; Amy Augustine-Concord Monitor; Dan O'Brien-Union Leader; June Antle; Dan Koppel; Jason Cole; Kristen Cole; Raymond Harrison; Joanne Harrison; Cyndee Gilman; Bruce Gilman; John Lange; Dawn Drew; Keith Lion; Ron Lemay; Bill Wynne; Diane Fleming; Eric Rineheimer.

I. CALL TO ORDER:

Chairman Craig Francisco called this meeting to order at 7:05 PM at the Weare Town Hall.

II. FINAL PUBLIC HEARING FOR ZONING AMENDMENTS:

FINAL PUBLIC HEARING TO DISCUSS ZONING AMENDMENT PROPOSALS FOR INCLUSION ON THE MARCH 2010 TOWN WARRANT:

Chairman Francisco stated that tonight is the final public hearing for any proposed warrant articles to be included on the 2010 Town Warrant. The following amendments were discussed and some were changed. The proposed additions are in ***bold italics***; proposed deletions are ~~stricken through~~.

Are you in favor of the adoption of [Amendment No. 2](#), as proposed by the Planning Board for the Town Zoning Ordinance as follows: to amend Article 15.1.2 as follows:

All ***developments of*** residential subdivisions, condominiums and multi-family housing of 4 dwelling units or greater shall be subject to phasing in accordance with TABLE 1-2 below:

| Total Dwellings <i>Units</i> | <i>Maximum Annual</i> Building Permits |
|-----------------------------------|--|
| 4 | 2 per year |
| 4 to 10 5 to 10 | 5 4 per year |
| 11 to 18 | 6 5 per year |
| 19 to 28 | 7 6 per year |
| 29 to 40 | 8 7 per year |
| 41 to 54 | 9 8 per year |
| 55 or more | 10 9 per year |

TABLE 1-2 FOR RESIDENTIAL DEVELOPMENT PHASING:

The table illustrates the maximum number of available building permits ***approved under this article*** per development ***subdivision during any 12 month period.*** ~~per calendar year approved under this article.~~ Surplus permits in any given year shall not be added onto the number of permits available in the following year.

The board discussed this amendment and agreed that the word “development” should not be stricken, it should be left and to remove the word “***subdivision***” and it would read correctly.

Chairman Francisco asked for public input. No one present commented on this proposed amendment.

Frank Bolton moved to amend this amendment and “recommend” it on the 2010 ballot; George Malette seconded the motion, all in favor.

Are you in favor of the adoption of [Amendment No. 3](#), as proposed by the Planning Board for the Town Zoning Ordinance as follows: to amend Article 3.12.1 to further defines “active and substantial development” by amending the article as follows:

3.12.1 ***For the purpose of determining the minimum amount of work required in order to satisfy the provisions of RSA 674:39 pertaining to protection from subsequent amendments to local land use regulations, “active and substantial development and building” means:***

- (1) the construction of one or more subdivision roads or a portion thereof approved by the Planning Board, on a subdivision plan, including any required pavement sufficient to cause eligibility for certificates of occupancy for structures on abutting lots; the completion of drainage improvements, including erosion control measures, in accordance with the approved plans; and***
- (2) the continued compliance with the public health regulations and ordinances of the Town***

~~3.12.1 In approving any application, the Planning Board shall specify the threshold level of work which constitutes “active and substantial development and building” for the purpose of determining the minimum~~

~~amount of work required in order to satisfy the provisions of RSA 674:39 pertaining to protection from subsequent amendments to local land use regulations for a period of four (4) years. (Added 3/11/08)~~

Chairman Francisco asked for public input. No one present commented on this proposed amendment.

Neal Kurk moved to “recommend” this amendment for the 2010 ballot; Tom Clow seconded the motion, all in favor.

Are you in favor of the adoption of Amendment No. 4, as proposed by the Planning Board for the Town Zoning Ordinance as follows: to amend Article 27.3.7 as follows:

27.3.7 All parking within the cluster development shall be provided in ~~paved~~ off-street locations at a ratio of not less than two (2) spaces per dwelling unit

Chairman Francisco asked for public input. No one present commented on this proposed amendment.

George Malette moved to “recommend” this amendment for the 2010 ballot; Tom Clow seconded the motion, all in favor.

Frank Bolton stated that he will be stepping down from any action on this amendment. Chairman Francisco appointed Dani-Jean Stuart to sit as a voting member in Mr. Bolton’s place for the next amendment.

Are you in favor of the adoption of Amendment No. 5, as presented by petition for the Town of Weare Zoning Ordinance as follows: In an effort to broaden the commercial tax base in Town, we the undersigned registered voters, pursuant to NH RSA 675:4, hereby petition the Town of Weare, NH to place the following Zoning Amendment on the 2010 Town warrant for voter consideration: Amend Article 24 to add that; the installation and operation of an Asphalt Batch plant shall be allowed as an accessory use of a permitted or grandfathered gravel pit operation. As an accessory use the size shall be limited to 25% of the annual volume (tons or yards) of the total retail sales volume of the Asphalt Plant and Gravel pit combined; provided however that no part of the plan be located within 500’ of any residentially zoned abutter’s lot line within the Town of Weare. (By Petition)

Chairman Francisco recognized Chris Bolton to speak on the petition.

Chris Bolton stated that he submitted the article. He would like this article to go through to clear up some gray language in the Zoning Ordinance. He feels the existing language is there to allow it, but others feel there is not and unfortunately it will take a considerable amount of money from everyone to see who is right or wrong. He feels that there are a lot of people who are scared. Mr. Bolton explained that his intent for the plant is to take a product he currently sells and leaves the plant and use it on site, mix it with some liquid

asphalt and make a product. It is using the same material and area that he uses now. He knows there are concerns about leaks. If there was a leak, as soon as it hits the ground it solidifies and he can pick it up with the loader. We are talking about a 100' x 200' piece of land out of the total 1500 acres. Mr. Bolton stated he would have only wished that there was this much support and interest in generating enough revenue to support it when the Town tried to purchase it back a few years ago. He stated that he is a business man and as a business man he is looking to see what he can do to enhance the business. If he sells the property, which is not his intention at all, he doubts the next person is going to keep 1100 acres open. He has been a good neighbor. He allows a lot of people to use his land for hunting, snowmobiling, 4 wheeling, and if he sells it and gets developed, that would be a huge mistake for the Town to make. He has to think of something to generate revenue to pay for it and preserve it. In this state you are not going to put up some large structure to do a lot of business. An asphalt plant may not be the worse solution but certainly it would be better than the alternative of several hundred houses.

Jed Callen, attorney handed the board a letter that outlined his recommendation for disapproval of this petitioned zoning ordinance amendment regarding asphalt batch plants. Attorney Callen also handed the board a handful of petitions that contained in excess of 250 residents all of whom are opposed to the approval of this amendment.

Attorney Callen continued on and explained the following reasons why the Board should not recommend this petition. They were outlined as follows:

1. The proposed language is inappropriately proposed to amend only Article 24; and is thus illegal. The proposal is to insert the proposed provision as an amendment to Article 24. That Article regulates the Commercial Zoning District. The addition of this language only to Article 24 logically means that this provision (defining Asphalt Batch Plants as “accessory uses” to permitted or grand-fathered gravel pits) applies only to such pits in the Commercial District. Such an amendment of the ZO is probably illegal. If an Asphalt Batch Plant (ABP) is an “accessory use” to a permitted or grand-fathered gravel pit in the Commercial District, is it not a denial of Equal Protection of the law for the same not to apply in the Residential, RA or Industrial Districts? Passing this amendment will invite such a challenge, which would likely be successful. The amendment is illegal as written.
2. The proposal also violates other provisions of the ZO, as well as Principles of Land Use Law. “Accessory Use” is defined at Zoning Ordinance (ZO) Section 4.1 as “...a building or structure that is incidental to and subordinate to **the permitted use on a lot...**” (Emphasis added.). Under State law, a long line of cases also define “accessory uses” or uses accessory to permitted uses. See Becker v. Hampton Falls, 177 NH 437, 440 (1977); Nestor v. Meredith ZBA, 138 NH 632 (1994); Hannigan v. City of Concord, 144 NH 68, 71 (1999); and Fox v. Greenland, 151 NH 600, 607 (2004). The Petitioned amendment, in making legal an accessory use to a *grand-fathered use*, conflicts with the definition of “Accessory Use” in the Weare ZO, as well as being inconsistent with State law. Such inconsistency invites further, probably successful, legal challenge. It also violates a basic premise of the

ZO, and of Land Use Law; that non-conforming (“grand-fathered”) uses are disfavored, and subject to being brought back into conformance with the ZO through eventual destruction, change in use, or abandonment. “Grand-fathered” or “non-conforming” uses are necessarily, in Weare and everywhere, treated entirely differently than permitted uses. Non-conforming uses are subject to abandonment, discontinuance, and strict limitations on expansion, alteration, or change in size, use, or intensity of use. As such, expanding a grand-fathered use by permitting an accessory use to it, is inconsistent with ZO Section 3.4, and general principles of land use law. The inconsistency with ZO Sections 4.1 and 3.4 will invite litigation.

3. The formula limiting the size of the ABP is not workable or enforceable. In brief, calculating 25% of the volume of gravel and asphalt produced, requires calculus. The limit on asphalt production is expressed as an ever changing fraction of itself; I challenge any member of the Board or public to simply and dependably calculate the amount that is permitted as “accessory use”, even knowing the amount of gravel expected to be produced in a given pit. Further, if that amount is exceeded, what is the result? The ABP remains, but becomes an un-permitted use, no longer accessory to the pit? This is both incalculable, and unenforceable, definition; the violation of which would put the Town in an untenable situation.
4. The last sentence of the amendment is improper; it is the subject of site plan review. The amendment improperly attempts to do too much. It would be wholly proper if a legitimate ‘accessory use’ (to a permitted use) was made legal under the Zoning Ordinance, but limited as to location by the Planning Board during the process of Site Plan Review. To make proximity to a residentially zoned abutter a part of the definition of what is an accessory use, is improper. The Planning Board might require greater, or lesser, separation than that proposed herein if a ABP is ever proposed, but importantly, that determination is theirs, and has no place in the definition of an allowable accessory use.
5. The proposal is inconsistent with the Weare Master Plan. To the extent that the proposal is applicable to the Mt. William, Inc. site on Tax Map #409-004 the Weare Master Plan Update, lists “Melvin Valley (including the Mt. William area...)” as one of the nine areas of Town as important for conservation and worthy of protection from further development. (p. 215) This proposal is clearly inconsistent with the goal. Further, the Weare Master Plan Update, at p. 230, lists the Mt. William, Inc. gravel excavation site as a 10 acre excavation, and explicitly notes: “Only a small portion of this property is in active sand and gravel use (i.e. 10 acres). The balance of the property is zoned conservation and should remain permanently protected.” Clearly this proposal is inconsistent with that goal.
6. The proposal is a barely concealed attempt at illegal “spot zoning”. It is not legal to amend a Zoning Ordinance to benefit a single lot or small number of lots. According to State law and the Weare Zoning Ordinance, the purpose of the Weare Zoning Ordinance is and must remain “...promoting the public health, general growth, safety, and general welfare...” of the citizens of

Weare. (ZO Section 1.1). The proposal, by violating that purpose, is illegal, as spot zoning.

Neal Kurk asked Attorney Callen on point #3 you state that the formula limiting the size of the ABP (Asphalt Batch Plant) is not workable or enforceable and that there is no practical way to deal with that. Mr. Kurk gave a brief example in an attempt to show how the calculations could be easily done. Attorney Callen accepted the example but asked what happens at 26%.

Chairman Francisco commented that on point #4 the last sentence of the Amendment is Improper and it is subject to site plan review. He feels that 500 feet is basically a setback issue and not a site plan issue. Attorney Callen stated that it reads it differently.

Chairman Francisco also pointed out that on Page 84 of the master plan states expanding the commercial/industrial and talks about that being the place in Town to expand that base. Attorney Callen concurred that it was.

Chairman Francisco continued on point #1, the gravel pit is allowed by a special exception only in the commercial zone, why wouldn't this be the place to put this type of operation. Attorney Callen explained that if another property is grandfathered in another zone, why can't they do it too.

Dani-Jean Stuart asked if this was to pass, and others could do it too. Mrs. Stuart asked if this type of operation would create an increase in truck traffic. She asked if this product spills on the roadway, which is responsible for picking it up. She would like to see the benefit in dollar amounts to the Town.

Chris Bolton stated that anything commercial broadens the tax base versus a residential home.

Neal Kurk stated that if he is adding a million and a half of assessment with this project, it would bring in about \$24,000 in tax dollars.

Cyndee Gilman, 100 Huntington Hill Road, asked how many yards a year is coming out of there.

Mitch Filson, 954 River Road, he respects what Mr. Bolton does, however he feels that Mr. Bolton's right stops when it not fair and is detrimental to his property value. He picked Weare as a place to live in because of the rural neighborhood.

Eric Rineheimer, 86 Roosevelt Drive, stated that the section of the Master Plan that Chairman Francisco stated about expanding in the industrial/commercial development refers to the property off Route 114 and not River Road. The character to the Town is being rural and feels it is not proper for the zoning ordinance. He feels it is not consistent with the Towns objective.

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Keith Lion, he has sat through two meetings and he feels that Mr. Bolton has not had the chance to speak at all about the proposal. Mr. Bolton stated that he did speak about it earlier before Mr. Lion arrived.

George Malette asked if the proposed location was within the existing grandfathered area for mining. Chris Bolton said that it's within 500 feet of the existing building and that there are 1300 acres that are grandfathered for mining.

Barry Arnold, River Road, stated that when things have to be elaborated on is fine, but no one is looking at the dangers of this proposal. These trucks that are going on the road, many of them don't meet the federal standard. Most of the drivers enjoy the sound of the engine brakes. He is looking for some guarantee to safety. Mr. Bolton responded that he tells the drivers not to use the engine brake but he was told that he was not allowed to request that because it involves a safety issue. Mr. Bolton stated that he does have a small set of house rules and if you get caught violating one of them, like speeding, they are not allowed back to get more material.

Susan Arnold, Worthley Drive, stated that she has a concern with the trucks speeding.

Chris Bolton again stated that the intent of the asphalt plant is to decrease truck traffic. He stated that he is looking to take a product that he has that leaves his property all day long which is worth less, keep it and produce a different product that he can sell for a higher price.

John Nelson, 55 Huntington Hill Rd, stated that there are several gravel pits in Town that this could pertain to. By the nature to the materials in a pit they are on aquifers. They have Rick Townes pit by Horace Lake; Mr. Bolton's by River Road; Bill Boisvert's pit by Cold Springs, the potential is there for any of these operations to have asphalt plants. These plants burn thousands of gallons of fuels. There will be tankers of fuel coming and going. A spill of the fuel could be damaging to the water.

Dawn Drew, 221 Bart Clough Road, stated that she would like to know if you, the board, are aware of this facility being connected to the DOT project. The board was quiet and didn't respond. Ms. Drew then asked Mr. Bolton if this facility was connected to the DOT project. Mr. Bolton stated that he sells materials everyday to the State of NH and other Towns. Ms. Drew then asked both the board and Mr. Bolton again. The board quietly responded, no. Mr. Bolton responded again the same as before, he sells materials everyday to the State of NH and other Towns. Ms. Drew then pointed out that currently we have a fund for the State tax paid at 2 cents per yard of material. She did some quick calculating and felt that 0.03 cents per truck load is not a lot of money. She is demanding a quality of life.

Tony Rolon, Roosevelt Drive, stated that he is one of 10 homes up for sale in his subdivision. He stated advertising it for \$479,000 and now he has dropped it to \$379,900. He has had several people come through then they get wind of the asphalt plant and they are not interested. He stated that he be coming back to the Town down the

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road to get the tremendous money back from the lost value. He is looking for a reduction in his taxes because his has been severely impacted. The asphalt plant regardless if it is controlled they don't care about the safeguards on the hill and he will be severely affected for the actions of this property.

Neal Kurk stated that your statement was based on the fact that you can see the plant, would it make any difference if it was located where you can't see it. Mr. Rolon responded, probably not they are not interested in knowing the plant is there or not. So it looks like he is there to stay.

Mitch Filson asked Mr. Bolton if he is hearing this correctly there would be trucks still removing material then there will be trucks getting asphalt. If it is 25% then Mr. Bolton is in charge of the whole scheme so he can make more products in order to be able to produce more asphalt.

Corinne Hill, resident, asked if this passes this just opens the door and not just you, what protection does she have that it will not happen next to her.

Chris Bolton responded that he looked very hard at that and that is why he put a 500' setback because he didn't think there is another gravel pit in Town that could meet that.

Neal Kurk asked if Mr. Bolton could give the board the numbers for some calculating. Chris Bolton stated that this year he removed approximately 300,000 yards. It comes out to about 4,000 truck loads. Mr. Filson then asked if there will be asphalt trucks coming by on top of that.

Ray Harrison, 36 Roosevelt Road, took offense to \$24,000 being an increase in revenue and would like to know how much the assessments will decrease as a result of this going in, which will reduce tax revenues.

Jed Callen, Attorney states that he appreciates the board listening to all the emotional issues but we are here for the amendment and not Chris Bolton's gravel pit. He has raised the question to see if it is spot zoning but he didn't look at every property in Town. Mr. Bolton stated earlier that he drafted it to apply to his sight only, which is spot zoning and that is illegal. He didn't think the board should support or recommend it. He appreciates Mr. Bolton being upfront but this could be beyond him someday.

Dawn Drew asked the 300,000 yards that is approximately taken from the pit last year, is that or does that include all the various spots. Mr. Bolton responded that approximately yardage is in its entirety.

Beth Salerno, 1105 River Road, stated that she would like to address the grandfathered portion and wanted to emphasize a grandfathered pit. She thought that a grandfathered pit is supposed to disappear in time and that she could outlive it. She objects to it on most of the face but if it is allowed would like to see some restrictions placed on it.

Chairman Francisco closed the public portion of this hearing.

Tom Clow stated that there are a lot of questions concerning the amendment. The first thing he did when an asphalt plant was being proposed was to visit one and see what it was all about. They visited the Pembroke plant. Amy Augustine from the Concord Monitor wrote an article after she visited the same site. He is not in favor of this amendment and not because of the asphalt plant. He has heard everyone talking about petroleum products. There are petroleum products on the roads already today. There are three gas stations in this Town. Home heating fuel is delivered to the majority of the homes in Weare. They could all crash too. It comes down to recommending or not recommending and if it was an amendment the board was in charge of creating then we would be able to change it but the amendment has to go on the ballot exactly as it appears which is where he sits. We don't have the legal resource to go over all that has been brought up this evening here, but he doesn't feel this is the threat to the environment everyone keeps indicating. The actual amendment would need a lot of work to it to get his support. There is a lot of misinformation. We are not talking about the threat that it is depicted to be.

Chairman Francisco stated that we have statutory time requirements and deadlines as to when he board has to make recommendations being a SB2 town and we are at time limit.

Neal Kurk stated that one of the things that he has seen in this town is a bipolar personality. On one hand we want to keep it rural but on the other hand we want to keep taxes low, so here is a business man that comes along with a plan and we say oh my god. Mr. Kurk stated that he went on the tour with Mr. Clow and it was not what everyone is thinking. He hopes that each and everyone here have an opportunity to view an asphalt plant. It will have a negative effect on the property taxes primarily because of ignorance. Mr. Kurk stated that he will be voting in favor of the motion to not recommend for a different reason. He feels there is a major problem with the way it was drafted and that if it was drafted for one property then that is illegal. If Mr. Bolton wants to do this he would have to go back and submit another petition, but it is too late for this year.

Tom Clow moved to not recommend amendment number 5 for the 2010 ballot; Neal Kurk seconded the motion. Discussion: George Malette stated that he thought that we needed to make all motions in the affirmative. The board discussed this and felt that as it was worded it would be ok to vote on. Vote: 4 in favor (Kurk; Clow; Malette and Stuart) and 1 opposed (Francisco).

III. OTHER BUSINESS:

SWOT DISCUSSION: Dani-Jean stated that SNHPC is looking at developing a 10 year plan, which appears to be like a metro center, which there is another meeting on January 25th that she has to bring. Neal stated that each could take it home fill it out and forward it back to Dani-Jean and she will bring it to the meeting. Tom stated that he skimmed this but is hard when you read the criteria that it fits to Weare.

DECEMBER 17, 2009 MINUTES: Tom Clow moved to approve the December 17, 2009 minutes as written; Neal Kurk seconded the motion, all in favor.

UNSEAL NON-PUBLIC MINUTES OF NOVEMBER 12, 2009: Chairman Francisco stated that in order for the Zoning Board to have the opinion that Attorney Bill Drescher has given, this board needs to unseal it. Mr. Bolton has filed an administrative appeal and the Zoning Board needs to have the opinion to understand the decision. The board discussed this and Neal Kurk stated that he doesn't think the board should unseal the letter and make it public, he felt it should be able to be shared with another Town board, but not unsealed for the general public. Neal Kurk moved to authorize the Chairman to contact Attorney Drescher and ask him to release a copy of the letter to the chairman of the Zoning Board, but to consider the letter a confidential and privilege nature; George Malette seconded the motion. Vote: all in favor.

CONSERVATION COMMISSION: Chairman Francisco informed the board that he sent an email and invited the Conservation Commission to attend the Planning Board meeting on January 28th to create questions. Then on February 11th have both the Conservation Commission and the Planning Board will meet and February 11th to meet with ABill Drescher who is available that evening.

IV. ADJOURNMENT:

As there was no further business to come before the board, George Malette moved to adjourn at 9:10 PM; Tom Clow seconded the motion.

Respectfully submitted,

Naomi L. Bolton
Town Administrator
(Minute Taker)